Opinion issued August 25, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00810-CV

CHARLES THOMPSON, Appellant

V.

ACE AMERICAN INSURANCE COMPANY, Appellee

On Appeal from the 61st Judicial District
Harris County, Texas
Trial Court Case No. 08-19436

MEMORANDUM OPINION

Appellant, Charles Thompson, challenges the trial court's judgment entered, after a jury trial, in favor of appellee, Ace American Insurance Company ("Ace"), in its suit for judicial review of a decision of the Texas Department of Workers'

Compensation ("DWC") in favor of Thompson.[1] In his first two issues, Thompson contends that the trial court erred in including a date of injury in its question to the jury on the issue of whether Ace had proven that Thompson did not sustain a compensable injury. In his third issue, Thompson contends, in the alternative, that if a date of injury was properly included in the question, the trial court erred in not submitting to the jury a definition of the term "date of injury" in regard to an occupational disease.

We reverse and remand.

Procedural History

After Thompson, an employee at Brock Maintenance ("Brock"), sought workers' compensation benefits from Ace for an alleged injury that he sustained at work, Ace denied his claim. Subsequently, on November 7, 2007, a hearing officer at the DWC conducted a contested case hearing to decide the following issues:

1. Did [Thompson] sustain a compensable injury?

2. Does [Thompson] have disability resulting from the claimed injury, and if so, for what periods?

3. What is the date of injury?

The DWC hearing officer issued a decision, finding that Thompson had "sustained a compensable injury on March 18, 2007" and he "had disability for the

[1] *See* TEX. LABOR CODE ANN. § 410.251 (Vernon 2006).

period beginning April 3, 2007, and continuing through the date of this hearing and at no other times." The hearing officer's order contained findings of fact and conclusions of law, including a finding that Thompson had "sustained damage or harm to the physical structure of his body while in the course and scope of his employment on March 18, 2007" and a conclusion that Thompson had "sustained a compensable injury on March 18, 2007."

Ace appealed the hearing officer's decision to the DWC Appeals Panel, which upheld the hearing officer's decision. The notice of the DWC Appeals Panel's decision listed a date of injury of March 19, 2007.[2]

Ace then filed the instant suit, seeking review of the DWC Appeals Panel decision in which it found that Thompson had sustained a compensable injury and he had disability beginning on April 3, 2007. In its original petition, Ace asserted that it preserved for appeal all issues presented to the DWC Appeals Panel, including, but not limited to:

> (1) "Did [Thompson] sustain a compensable injury?
>
> (2) Did [Thompson] have resulting [disability] from the claimed injury, and if so, for what periods?"

Attached to Ace's petition was the DWC Appeals Panel notice of its decision in which it stated that the "Hearing Officer's decision and Order signed on November 12, 2007 became final" on February 21, 2008.

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[2] The hearing officer, however, found the date of injury to be March 18, 2007.

Background

At trial, Richard Valdez, a project manager at Brock, testified that in March or April 2007, while working at the Valero Refinery in Texas City, Thompson informed him that he had sustained a "non-occupational" injury. Valdez explained that if an employee sustains a non-occupational injury, the employee needs to see his own doctor, and, if an employee sustains an occupational injury, the employee would first go to a first aid station at the refinery to determine whether he needs assistance from an outside clinic or hospital. Valdez noted that if an employee reports an injury to him, the employee would immediately go to the first aid station, and Valdez would not allow the employee to "just leave" and see his own doctor. Moreover, an employee who sustains an injury, either on the job or off the job, should report the injury to his supervisor to file an incident report. Based on the "daily activity report" admitted into evidence, Valdez opined that Thompson was not at work on March 18, 2007.

David Cummings, a Brock employee, testified that he saw Thompson on the job site with "open cuts" sometime in March or April 2007 when Thompson approached him to ask for a "Band-Aid" for some cuts on his knuckles that he had received while "at home, working on [a] car." Cummings noted that, according to the "time sheets," Thompson was not at work on March 18, 2007, and he explained that his previous testimony, in which he stated that Thompson had worked on

March 18, 2007, was incorrect because Cummings had made a mistake when he misread the time sheets. In his testimony at the contested case hearing, Cummings was asked, "Do you know if you were working with [Thompson] on March 19, 2007 or March 18, 2007?" To which he responded, "I did look back at the time sheets. And on March 18, 2007, he was working scaffolding. So he was working under my supervision, along with 40 or 50 other guys. So, I'm sure he was there."

Geoffrey Bottego testified that in spring 2007, he worked as a Brock safety director at the Valero Refinery. Bottego explained that he knew that Thompson, who is married to the mother of Bottego's wife, had sustained some cuts to his hand when he and Thompson had performed mechanical work on Bottego's "old pickup truck." Thompson had not told Bottego that he had sustained an injury to his hand while working at the refinery. Approximately one week after they had worked on the truck, Bottego, who saw that Thompson's hand was "getting pretty swollen" and the cuts were starting to "ooze," told Thompson that he needed to have a doctor look at his hand and get treatment. On cross-examination, Bottego stated that it is possible that Thompson's infection could have resulted from the combination of the pre-existing cuts and aggravation at work, caused by something getting on the cuts. Bottego also told Brock "claims people," "I believe — I'm the safety guy. I saw the cuts. I saw what he did for work. It's very possible that's what happened."

In his testimony at the contested case hearing, which was read to the jury, Thompson explained that on March 18, 2007, he was at work at the Valero Refinery painting some pipes when it began to rain and he and his co-workers picked up the paint and supplies to get them out of the rain. Thompson noted that there was usually a gray bucket, labeled "paint thinner," that the men used to clean their paintbrushes in and, "every now and then," they used the paint thinner to get paint off their hands and nails. Thompson later learned that some of his co-workers had "mix[ed] up a bunch of different materials" in an "identical" gray bucket. When he saw the gray bucket, he, assuming that it contained paint thinner, "splashed a little bit" on his fingers to rinse off the paint. Thompson then told his supervisor that he needed to rinse his hands because this "mix" of paint materials was on his hands as he had put them into the gray bucket. Thompson then told Valdez and Bottego about getting the "mix" of paint materials on his hands, and Bottego told Thompson to "go to the emergency room and have the hand looked after." The next day, Thompson went to an emergency room, where doctors told him that his hand had developed a severe infection. Thompson noted that before the injury at work, while working on Bottego's truck, he had sustained "small nicks and scratches . . . little knuckle-busters" on his hands.

A few days later, Thompson returned to work, when his hand "started getting really red, real irritated." While on a lunch break, Bottego, who had

approached Thompson to look at his hand, told Thompson to finish the day, but to take a few days off to "let this hand try to heal some more." Thompson again returned to work, where he was assigned to perform "sanding work," which he noted was "real dusty." After sanding some pipes, Thompson took off his gloves and noticed that the cuts in his hand had developed into an "infection" and "parts of [his] hand were starting to get big holes in them." Around April 3, 2007, Thompson again went to his supervisors about the infection "getting worse," and his supervisors gave him a "medical leave of absence."

Thompson noted that the records from his emergency room visit listed March 19, 2007 as the date of his release. Recognizing the date of his emergency room release, Thompson believed that March 18, 2007 was the day that he had put his hands into the "mix" of paint material at the refinery. However, the medical records listed the date of March 15, 2007 as the date of the "Accident Occurrence" and the location of his injury as "Home." Thompson explained that he had told emergency room personnel that the reason for his visit was because his hand had been exposed to paint chemicals. The medical records also contained a notation of "Self-employed. Home remodeling," and Thompson noted that he had previously done home remodeling work, but he stopped when he began working at Brock. However, he wrote "self-employed" on his emergency room records because

Valdez had threatened to fire him if he did not take "full responsibility to pay [his] own medical bills."

Standard of Review

A trial court has broad discretion in submitting its jury charge, and we review a complaint regarding the submission of jury questions for an abuse of discretion. *In re D.R.*, 177 S.W.3d 574, 581 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). On appeal, we reverse for error in the jury charge only if, after considering the record as a whole, including the pleadings, the evidence presented at trial, and the charge in its entirety, we conclude that the error probably caused the rendition of an improper verdict or probably prevented the appellant from presenting the case to an appellate court. *See* TEX. R. APP. P. 44.1; *Wal–Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2003); *Jordan v. Sava, Inc.*, 222 S.W.3d 840, 847 (Tex. App.—Houston [1st Dist.] 2007, no pet.). "Submission of an improper jury question can be harmless error if the jury's answers to other questions render the improper question immaterial." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). "A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict." *Id.* "Submission of an immaterial issue is not harmful error unless the submission confused or misled the jury." *Id.* "When determining whether a particular question could have confused or misled

the jury, we consider its probable effect on the minds of the jury in the light of the charge as a whole." *Id.* (citations omitted).

Jury Charge Error

In his first issue, Thompson argues that the trial court erred in including a date of injury in its question to the jury on the issue of whether Ace had proven that Thompson did not sustain a compensable injury because Ace failed to specifically appeal the date of injury to the DWC Appeals Panel and did not include the issue in its original petition.

The Texas Workers' Compensation Act provides a four-tier system for the disposition of claims. *Subsequent Injury Fund v. Serv. Lloyds Ins. Co.*, 961 S.W.2d 673, 675 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see generally* TEX. LAB. CODE ANN. §§ 410.002–410.308 (Vernon 2006 & Supp. 2010). The first tier is a benefit review conference conducted by a benefit review officer. *Subsequent Injury Fund*, 961 S.W.2d at 675. From the benefit review conference, the parties may proceed, by agreement, to arbitration. *Id.* If the parties do not agree to arbitrate, the aggrieved party may seek relief at a contested case hearing. *Id.* The hearing officer's decision is final in the absence of an appeal. TEX. LAB. CODE ANN. § 410.169 (Vernon 2006). At the third tier, a party may seek review by an administrative appeals panel. *Subsequent Injury Fund*, 961 S.W.2d at 675. In the fourth tier, a party aggrieved by a final decision of the appeals panel has the

right to seek judicial review of the appeals panel decision. TEX. LAB. CODE ANN. § 410.251 (Vernon 2006); *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000); *see also In re Tex. Workers' Comp. Ins. Fund*, 995 S.W.2d 335, 37 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding [mand. denied]).

A party may not raise an issue in the trial court that was not raised before a DWC Appeals Panel. TEX. LAB. CODE ANN. § 410.302(b) (Vernon 2006); *Alexander v. Lockheed Martin Corp.*, 188 S.W.3d 348, 353 (Tex. App.—Fort Worth 2006, pet. denied). A trial is "limited to issues decided by the appeals panel and on which judicial review is sought," and the "pleadings must specifically set forth the determinations of the appeals panel by which the party is aggrieved." TEX. LAB. CODE ANN. § 410.302(b). A party waives judicial review of any issue not raised before the DWC Appeals Panel and identified in a timely request for judicial review. *Adams v. Liberty Mut. Ins. Co.*, No. 01-09-00178-CV, 2010 WL 143450, at *3 (Tex. App.—Houston [1st Dist.] Jan 14, 2010 no pet.) (mem. op).

Here, at the contested case hearing, the hearing officer determined three issues:

1. Did [Thompson] sustain a compensable injury?

2. Does [Thompson] have disability resulting from the claimed injury, and if so, for what periods?

3. What is the date of injury?

Ace then appealed the findings of the hearing officer to the DWC Appeals Panel. However, at both the contested case hearing and the DWC Appeals Panel hearing, Ace did not dispute the date of Thompson's injury. In fact, Ace's witness testified that Thompson was at work on March 18, 2007. We note that, in its brief to this Court, Ace states, "That specific date of injury for the alleged workplace claim was never appealed and became final."

In its original petition, Ace challenged two issues:

1. Did [Thompson] sustain a compensable injury?

2. Did [Thompson] have resulting [disability] from the claimed injury, and if so, for what periods?

Ace subsequently amended its petition, challenging whether Thompson had sustained a compensable injury specifically on March 18, 2007. At trial, Ace presented extensive evidence that Thompson was not at work on March 18, 2007, and Ace asserted that this evidence established that Thompson could not have suffered a compensable injury.

During the trial court's charge conference, a dispute arose over whether to include the date of injury in the question to the jury on the issue of whether Ace had proven that Thompson did not sustain a compensable injury. Ace argued that March 18, 2007 should be included in the question as the injury date because that is the date that the hearing officer originally found to be the date of injury. The

trial court noted that although Ace had not appealed the date of injury, it had offered evidence to suggest that March 18, 2007 was not the date on which Thompson had been injured and, thus, by "default," Ace was arguing against the date of injury. Thompson argued that the date of injury was not relevant because this is an occupational disease case, and he asserted that the date of injury would only have been relevant if there had been a limitations dispute. The trial court included in its question March 18, 2007 as the injury date, and Thompson objected on the ground that the trial court lacked jurisdiction to re-adjudicate the question of the date of injury because Ace had not appealed this issue. Thompson also asserted that including the date of injury in the charge would materially mislead the jury.

A party may not raise an issue in the trial court that was not raised before a DWC appeals panel. TEX. LAB. CODE ANN. § 410.302(b). Ace disputed whether "Thompson sustained a compensable injury and had resulting disability," arguing that Thompson's injury was a non-occupational injury. Compensable injury "means an injury that arises out of and in the course and scope of employment." *Id.* § 401.011(10).

Here, at the contested case hearing, the hearing officer heard testimony from Ace's witness that Thompson was at work on March 18, 2007. Based upon the evidence presented, the hearing officer determined that the date of injury was

March 18, 2007. The Texas Labor Code requires that a request for review by an appeals panel clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought. *Id.* § 401.202(c) (Vernon 2006); *Adams*, 2010 WL 143450, at *4. Ace does not dispute that neither it nor Thompson appealed the issue of the date of his injury.

In allowing Ace to focus the trial on the date of injury and including the date in its jury question, when the issue had not been appealed to the trial court, the trial court in fact allowed Ace to present an issue to the jury that had not been presented to the DWC Appeals Panel. A party may not raise an issue in a trial court that was not raised before a DWC appeals panel. *Alexander*, 188 S.W.3d at 353; *see Tex. Mut. Ins. Co. v. Ochoa*, No. 04-09-00401-CV, 2010 WL 2844464, at *4 (Tex. App.—San Antonio July 21, 2010, no pet.) (mem. op.) (holding that because insurance company did not appeal administrative finding that injury did not extend to and include employee's back problems that issue was waived). Here, the issue of compensability was disputed and appealed; however, the specific date of injury was not. Ace was entitled to present evidence on the issue of compensability, including evidence as to whether Thompson's injury had occurred in the course and scope of his employment. However, Ace, because it did not previously dispute and appeal the specific date of Thompson's injury, was not entitled to a question essentially asking the jury to resolve the case on the issue of the specific date of

Thompson's injury. Because Ace had failed to appeal the issue of the date of Thompson's injury, the issue was not properly before the trial court, and we hold that the trial court erred in including the date in its question to the jury. We further hold that this error harmed Thompson because, even if the jury believed that the evidence demonstrated that Thompson had sustained a compensable injury within the course and scope of his employment, the jury was required to find against Thompson if it was uncertain of the exact date on which the injury occurred. The trial court's error thus had the probable effect of misleading and confusing the jury. *See Alexander*, 897 S.W.2d at 752; *see also* TEX. R. APP. P. 44.1.

Citing *Krueger v. Atascosa County*, Ace argues that Thompson failed to exhaust his administrative remedies on the issue of the specific date of his injury because even a prevailing claimant must appeal an adverse ruling. 155 S.W.3d 614, 619 (Tex. App.—San Antonio 2004, no pet.). However, this court has distinguished *Krueger*, noting that there "the dispositive issue was the *complaining* party's failure to appeal the hearing officer's findings and conclusions to the appeals panel —not the *prevailing* party's failure." *In re Metro. Transit Authority*, 334 S.W.3d 806, 812 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding [mand. denied]). Here, Thompson was the prevailing party at both the contested case hearing and the DWC Appeals Panel hearing, and no adverse ruling was made against Thompson. The DWC Appeals Panel decided the issue of compensability

in favor of Thompson, and he was not aggrieved by the finding that his compensable injury occurred on March 18, 2007 because the specific date of his injury was never at issue at the administrative level.

We sustain Thompson's first issue.[3]

Conclusion

We reverse the judgment of the trial court and remand for further proceedings.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, Massengale.

[3] Having sustained Thompson's first issue, we need not address his remaining issues.